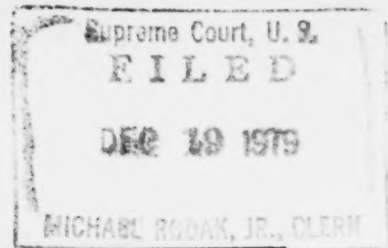


No. 79-707



In the Supreme Court of the United States

OCTOBER TERM, 1979

ARLETTA UPTEGROVE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioners instituted this suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages resulting from the death of Edwin Uptegrove in 1975. At the time of his death, Uptegrove was a Navy lieutenant on active duty, traveling on leave as a space-available passenger on an Air Force plane that crashed near Seattle, Washington, allegedly due to the negligence of Federal Aviation Administration (FAA) air traffic controllers (Pet. App. A-12 to A-13).¹

¹Department of Defense regulations allow active duty military members on leave to travel on military aircraft on a space-available basis.

Petitioners filed suit in the United States District Court for the Southern District of California against the United States and three air traffic controllers. The district court granted the government's motion for summary judgment on the basis of *Feres v. United States*, 340 U.S. 135 (1950). The action against the individual defendants was dismissed for lack of personal jurisdiction. The court of appeals affirmed, holding that the serviceman's death was incident to his military service and thus that petitioners' action was barred by *Feres* (Pet. App. A-12 to A17).

1. The court of appeals' decision is correct. This Court held in *Feres* that the Federal Tort Claims Act does not allow damage suits for death or injuries sustained by members of the armed forces during an activity that was incident to their military service. Petitioners contend (Pet. 6-10), however, that because Uptegrove was on leave at the time of the accident, recovery should be allowed under *Brooks v. United States*, 337 U.S. 49 (1949). In that case the servicemen were on furlough, driving a privately owned car on a public highway, when they were struck by a military vehicle. In permitting the FTCA action to proceed, the Court emphasized that it was "dealing with an accident which had nothing to do with [petitioners'] army careers * * *." *Id.* at 52. In this case, however, the decedent was on active duty, on temporary leave, traveling from his duty station to his home on a military plane, a passage he was able to acquire because of his status as a serviceman (Pet. App. A-13). Thus the decision barring petitioners' claim is not inconsistent with *Brooks*.²

²Petitioners also contend that this case is not governed by *Feres* because the alleged tortfeasors here were civilian employees. As the court of appeals held, the status of the deceased, not the status of the tortfeasor, controls (Pet. App. A-17). *United States v. Lee*, 400 F. 2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969).

Petitioners' reliance (Pet. 10-12) on *United States v. Brown*, 348 U.S. 110 (1954), is likewise misplaced. In *Brown*, the Court allowed a discharged veteran to recover damages under the FTCA for injuries caused by negligent treatment at a Veterans Administration hospital. The Court observed that "[t]he injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline." *Id.* at 112. This case is different. The decedent here was on active duty at the time of the accident and was subject to military discipline (Pet. App. A-13).

In sum, as the court of appeals noted (Pet. App. A-15), the lower courts have consistently held that *Feres* bars claims for death or injury incurred by persons in military service while traveling gratuitously on a military plane, even though they may have been on leave at the time. See *Herreman v. United States*, 476 F. 2d 234, 235 (7th Cir. 1973); *Archer v. United States*, 217 F. 2d 548 (9th Cir. 1954), cert. denied, 348 U.S. 953 (1955); *Homlitas v. United States*, 202 F. Supp. 520 (D. Ore. 1962); *Fass v. United States*, 191 F. Supp. 367 (E.D. N.Y. 1961). See also *United States v. Carroll*, 369 F. 2d 618 (8th Cir. 1966). This decision is in accord with that authority.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1979